

KAREN P. HEWITT  
United States Attorney  
PETER J. MAZZA  
Assistant U.S. Attorney  
California State Bar 239918  
United States Attorney's Office  
880 Front Street #6293  
San Diego, CA 92101-8893  
Telephone: (619) 557-5528

Attorneys for Plaintiff  
United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Case No. 07CR3190-JAH

Plaintiff, ) DATE: April 14, 2008  
) TIME: 11:00 a.m.  
)  
) GOVERNMENT'S RESPONSE IN OPPOSITION  
v. ) TO DEFENDANT'S MOTIONS *IN LIMINE* TO:  
JOSE RAYMUNDO )  
CONTRERAS-HERNANDEZ, )  
)  
) (1) COMPEL THE GOVERNMENT TO  
Defendant. ) PRECLUDE THE VALIDITY OF THE  
) DEPORTATION TO THE JURY;  
) (2) EXCLUDE EVIDENCE NOT PRODUCED  
) IN DISCOVERY;  
) (3) EXCLUDE DOCUMENTS ABSENT  
) REDACTION;  
) (4) PRECLUDE TESTIMONY FROM  
) GOVERNMENT WITNESSES REFERRING  
) TO DEFENDANT AS THE "ALIEN";  
) (5) PROVIDE INSPECTION OR  
) PRODUCTION OF CERTIFIED  
) DOCUMENTS;  
) (6) PRECLUDE INTRODUCTION OF "MUG  
) SHOTS" OF DEFENDANT;  
) (7) PROHIBIT THE CERTIFICATE OF  
) NON-EXISTENCE OF RECORD AS  
) INADMISSIBLE;  
) (8) PRECLUDE EVIDENCE UNDER 404(b)  
) AND 609;  
) (9) ALLOW ATTORNEY CONDUCTED VOIR-  
) DIRE;  
) (10) ORDER PRODUCTION OF GRAND JURY  
) TRANSCRIPTS;  
) (11) PRECLUDE DOCUMENTS OF  
) DEPORTATION AS EVIDENCE OF  
) ALIENAGE; AND  
) (12) GRANT LEAVE TO FILE FURTHER  
) MOTIONS.

1 COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and  
2 through its counsel, KAREN P. HEWITT, United States Attorney, and  
3 Peter J. Mazza, Assistant United States Attorney, hereby files its  
4 Response in Opposition to Defendant's above-referenced Motions In  
5 Limine. This Response is based upon the files and records of this  
6 case.

7 I

8 STATEMENT OF FACTS

9 1. INSTANT OFFENSE

10 On October 27, 2007, United States Supervisory Border Patrol  
11 Agent Mark E. Noland was conducting assigned patrol duties in the  
12 Campo Border Patrol Stations area of operations. At approximately  
13 3:00 a.m., Agent Noland responded to a seismic intrusion device  
14 located on a trail known to be used by illegal aliens to further their  
15 illegal entries into the United States. The seismic intrusion device  
16 is located approximately nine miles east of the Tecate, California  
17 Port of Entry and approximately 13 miles north of the United  
18 States/Mexico international boundary.

19 Upon arriving at the location of the seismic intrusion device,  
20 Agent Noland observed fresh footprints headed in a north-bound  
21 direction. Agent Noland followed the footprints north until he came  
22 upon a group of ten individuals attempting to conceal themselves.  
23 Agent Noland identified himself as an United States Border Patrol  
24 agent. He then questioned each individual regarding their immigration  
25 status. All ten individuals, including Defendant, stated that they  
26 were citizens and nationals of Mexico without any documents to allow  
27 them to enter or remain in the United States legally. Defendant and  
28 the other nine individuals were taken into custody and transported to  
the Campo, California Border Patrol Station.

1 At the station, Defendant's personal information was entered into  
 2 immigration and criminal history databases. Defendant's identity was  
 3 confirmed, along with his criminal and immigration histories.

4 At approximately 3:00 p.m., Agents informed Defendant of his  
 5 Miranda rights. Defendant invoked those rights. No questions were  
 6 asked of Defendant.

## 7 **2. DEFENDANT'S IMMIGRATION HISTORY**

8 Defendant is a citizen of Mexico who was physically removed from  
 9 the United States through the San Ysidro, California Port of Entry to  
 10 Mexico on September 27, 2007.

## 11 **3. DEFENDANT'S CRIMINAL HISTORY**

12 Defendant was convicted of Solicitation to Commit Murder, in  
 13 violation of California Penal Code Section 653F(B) by a California  
 14 Superior Court in Santa Cruz, California on October 28, 2005.

## 15 **II**

### 16 **POINTS AND AUTHORITIES**

#### 17 **1. COMPEL THE GOVERNMENT TO PROVE THE VALIDITY OF THE 18 DEPORTATION TO THE JURY**

19 The Defendant moves the Court to permit him to argue to the jury  
 20 the lawfulness of his deportation. Ninth Circuit precedent forecloses  
 21 collateral attack of a prior deportation at trial, United States v.  
 22 Alvarado-Delgado, 98 F.3d 492 (9th Cir. 1996) (en banc), cert. denied,  
 23 519 U.S. 1155 (1997), Moreover, Alvarado-Delgado has not been  
 24 overruled by the enactment of 8 U.S.C. § 1326(d), Apprendi v. New  
 25 Jersey, 530 U.S. 466 (2000), and United States v. Buckland, 289 F.3d  
 26 558 (9th Cir. 2002) (en banc). The Defendant's motion should be  
 27 denied.

28 First, the validity of a prior deportation is not an element of  
 the offense that must be proved to the jury. Alvarado-Delgado, 98  
 F.3d at 493. Apprendi and Buckland are not controlling under these

1 circumstances and have not impliedly or expressly overruled Alvarado-  
2 Delgado. Accordingly, in this regard, the only issue for the jury to  
3 decide at trial is whether the Defendant was physically removed from  
4 the United States to Mexico. Second, Defendant has had the  
5 opportunity to challenge the validity of his deportation, which was  
6 denied by the Court on March 10, 2008. See Docket No. 17. Defendant  
7 should not now be given an opportunity to challenge the validity of  
8 his deportation in front of a jury.

9 **2. EXCLUDE EVIDENCE NOT PRODUCED IN DISCOVERY**

10 The Government has and will continue to comply with its discovery  
11 obligations. The Government will provide an exhibit list and an  
12 opportunity for Defendant to review its exhibits before trial.

13 **3. EXCLUDE DOCUMENTS ABSENT REDACTION**

14 Defendant requests that the Government be ordered to redact A-  
15 File documents relating to the fact that Defendant was previously  
16 convicted of any crime. The Government will redact the phrase "a final  
17 conviction for an aggravated felony" from the Final Administrative  
18 Removal Order if that is introduced into evidence.

19 The Government objects to Defendant's request under Rule 403 that  
20 the Court order the Government to redact any reference to Defendant  
21 using an alias. The use of an alias is not prejudicial as to unduly  
22 influence the jury.

23 The Government objects to Defendant's request that the Court  
24 order the Government to redact any reference to Defendant as an  
25 "alien." First, the word alien in and of itself is not so prejudicial  
26 as to unduly influence the jury in its decision making. Indeed, one  
27 of the elements the Government has to prove at trial is that Defendant  
28 is an alien; a Section 1326 prosecution cannot go forward without  
references being made to Defendant's alienage. Removal of references

1 to alienage on the warrants of deportation would prevent the  
2 Government from presenting a complete picture of the deportation  
3 proceedings. The Government has no objection to the Court instructing  
4 the jury that, while they may have heard the term "the alien" during  
5 the trial, the jury must decide whether the Government has proven  
6 beyond a reasonable doubt that Defendant is, in fact, an alien.

7       **4. PRECLUDE TESTIMONY FROM GOVERNMENT WITNESSES REFERRING TO**  
8       **DEFENDANT AS THE "ALIEN"**

9       For the reasons in the previous section, the Government objects  
10 to the Defendant's motion to preclude the Government witnesses from  
11 referring to Defendant as an "alien."

12       **5. PROVIDE INSPECTION OR PRODUCTION OF CERTIFIED DOCUMENTS**

13       As stated above, the Government will provide Defendant with an  
14 exhibit list prior to trial. Additionally, the Government will  
15 provide Defendant with a copy of the exhibits it intends to introduce.

16       **6. PRECLUDE INTRODUCTION OF "MUG SHOTS" OF DEFENDANT**

17       The Government must demonstrate that Defendant is the same  
18 individual who was previously deported from the United States. On  
19 March 10, 2008, the Court granted the Government's motion for  
20 fingerprint exemplars. See Docket No. 17. The Government must also  
21 prove as an element of the offense that Defendant has been previously  
22 deported. To do that, the Government intends to introduce Defendant's  
23 Warrant of Deportation, dated September 21, 2007. That document  
24 includes a photograph of Defendant. This photograph, and the  
25 accompanying fingerprint, are essential to demonstrating that  
26 Defendant had previously been deported. Accordingly, Defendant's  
27 motion should be denied.

28 //

//

1           **7.     PROHIBIT THE CERTIFICATE OF NON-EXISTENCE OF RECORD AS**  
2           **INADMISSIBLE**

3           The Government intends to offer documents from the Citizenship  
4 and Immigration Service's ("CIS") "A-File" that corresponds to  
5 Defendant's name in order to establish Defendant's alienage, prior  
6 deportation, and that he was subsequently found in the United States  
7 without having sought or obtained authorization from the Attorney  
8 General. The documents are self-authenticating "public records," Fed.  
9 R. Evid. 803(8)(B), or, alternatively, "business records." Fed. R.  
Evid. 803(6).

10          The Ninth Circuit has addressed the admissibility of A-File  
11 documents in United States v. Loyola-Dominquez, 125 F.3d 1315 (9th  
12 Cir. 1997). There, Loyola-Dominquez appealed his § 1326 conviction,  
13 arguing that the district court erred in admitting at trial certain  
14 records from his A-File. See id. at 1317. The district court had  
15 admitted: (1) two prior warrants of deportation; (2) a prior warrant  
16 for the defendant's arrest; and (3) a prior deportation order. The  
17 defendant in Loyola-Dominquez argued that admission of the documents  
18 violated the rule against hearsay and denied him his Sixth Amendment  
19 right to confront witnesses. The Ninth Circuit rejected his  
20 arguments, holding that the documents were properly admitted as public  
21 records. Id. at 1318. The court first noted that documents from a  
22 defendant's immigration file, although "made by law enforcement  
23 agents, . . . reflect only 'ministerial, objective observation[s]'" and  
24 do not implicate the concerns animating the law enforcement exception  
25 to the public records exception." Id. (quoting United States v.  
26 Hernandez-Rojas, 617 F.2d 533, 534-35 (9th Cir. 1980)). The court  
27 also held that such documents are self-authenticating and, therefore,  
28 do not require an independent foundation. Id.

1 Consistent with Loyola-Dominguez, this Circuit has consistently  
2 held that documents from a defendant's immigration file are admissible  
3 in a § 1326 prosecution to establish the defendant's alienage and  
4 prior deportation. See, e.g., United States v. Contreras, 63 F.3d  
5 852, 857-58 (9th Cir. 1995) (district court properly admitted warrant  
6 of deportation, deportation order and deportation hearing transcript);  
7 United States v. Hernandez-Rojas, 617 F.2d at 535 (district court  
8 properly admitted warrant of deportation as public record); United  
9 States v. Dekermenjian, 508 F.2d 812, 814 n.1 (9th Cir. 1974)  
10 (district court properly admitted "certain records and memoranda of  
11 the Immigration and Naturalization Service" as business records,  
12 noting that records would also be admissible as public records).

13 The Ninth Circuit has held that a Certificate of Non-existence  
14 of Record ("CNR") is not "testimonial" within the meaning of Crawford  
15 v. Washington, 124 S. Ct. 1354 (2004), and therefore may be admitted  
16 without violating the Confrontation Clause. See United States v.  
17 Cervantes-Flores, 421 F.3d 825, 831-33 (9th Cir. 2005). See also  
18 United States v. Mateo-Mendez, 215 F.3d 1039, 1042-45 (9th Cir. 2000)  
19 (district court properly admitted certificate of nonexistence).  
Accordingly, the CNR is admissible.

20 **8. PRECLUDE EVIDENCE UNDER 404(b) AND 609**

21 **a. 404(b)**

22 The United States may offer evidence regarding Defendant's  
23 previous illegal re-entry activity. Defendant's prior acts are  
24 relevant to this current case because they involve substantially the  
25 same conduct for which he is currently charged.

26 Rule 404(b) of the *Federal Rules of Evidence* precludes the  
27 admission of evidence of "other acts . . . to prove the character of  
28 a person in order to show action in conformity therewith" but allows

1 such evidence to establish "motive, opportunity, intent, preparation,  
2 plan, knowledge, identity, or absence of mistake or accident." Fed.  
3 R. Evid. 404(b). The Ninth Circuit has adopted a four-part test to  
4 determine the admissibility of evidence under Rule 404(b). The court  
5 should consider the following: (1) the evidence of other crimes must  
6 tend to prove a material issue in the case; (2) the other crime must  
7 be similar to the offense charged; (3) proof of the other crime must  
8 be based on sufficient evidence; and (4) commission of the other crime  
9 must not be too remote in time. See United States v. Montgomery, 150  
10 F.3d 983, 1000-01 (9th Cir. 1998). In addition to satisfying the  
11 four-part test, evidence of other crimes must also satisfy the Rule  
12 403 balancing test, i.e., its probative value must not be  
13 substantially outweighed by the danger of unfair prejudice. See Fed.  
14 R. Evid. 403.

15 In this case, Defendant's prior acts of illegally entering the  
16 United States are similar to the present instance, when Defendant also  
17 crossed into the United States. The probative value of this  
18 information is not substantially outweighed by any prejudicial effect.  
19 Evidence of these acts are admissible under Rule 404(b) for purposes  
20 of proving preparation, plan, knowledge, motive, absence of mistake  
21 or accident. As such, the Government may offer testimony and  
22 documents from the defendant's A-File regarding these prior instances.

23 **b. 609**

24 Rule 609 provides that evidence that an accused has been  
25 convicted of a crime punishable by imprisonment in excess of one year  
26 "shall be admitted if the court determines that the probative value  
27 of admitting this evidence outweighs its prejudicial value to the  
28 accused." United States v. Martinez-Martinez, 369 F.3d 1076, 1088  
(9th Cir. 2004). Evidence of the conviction is admissible if ten



1 years or less has elapsed since the later of: (1) the date of  
2 conviction; or (2) the release of the witness from the confinement  
3 imposed for that conviction. Fed. R. Evid. 609(b).

4 In United States v. Cook, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979)  
5 (en banc), overruled on other grounds by Luce v. United States, 469  
6 U.S. 38 (1984), the Ninth Circuit set forth a five-factor test for  
7 balancing the relative probativeness and unfair prejudice of a prior  
8 conviction. Under this test, the Court should consider: (1) the  
9 impeachment value of the prior crime; (2) the temporal relationship  
10 between the conviction and the defendant's subsequent criminal  
11 history; (3) the similarity between the past and the charged crime;  
12 (4) the importance of defendant's testimony; and (5) the centrality  
13 of the credibility issue. Id. This court need not analyze each of  
14 the five factors explicitly. United States v. Jimenez, 214 F.3d 1095,  
15 1098 (9th Cir. 2000).

16 If Defendant chooses to testify, his credibility will be a  
17 central issue in the case and Defendant's character for honesty is a  
18 factor that should be carefully weighed by the Court. The importance  
19 of Defendant's testimony is crucial in a case such as this, where  
20 Defendant would presumably be called to testify only if he intended  
21 to claim that: (1) he was involuntarily brought to this country; (2)  
22 he did not have a conscious desire to enter the United States; (3) he  
23 was never actually deported; (4) he was not an illegal alien; (5) he  
24 did not know he was in the United States; or (5) he had received the  
25 permission to re-enter the United States, even though DHS has no  
26 record of such permission being granted.

27 Should the defendant testify, the Government should be permitted  
28 to demonstrate Defendant's lack of trustworthiness by utilizing for  
impeachment purposes his prior felony conviction for solicitation to

1 commit murder. Defendant committed the offense and was released from  
2 prison within the past ten years, and the probative value of his  
3 conviction is not substantially outweighed by the danger of unfair  
4 prejudice.

5 **9. ALLOW ATTORNEY CONDUCTED VOIR-DIRE**

6 The Government does not oppose Defendant's motion.

7 **10. ORDER PRODUCTION OF GRAND JURY TRANSCRIPTS**

8 Defendant seeks production of the grand jury transcripts yet  
9 fails to support his motion with a showing of the requisite need to  
10 invade the sanctity of the grand jury's deliberations. As such, his  
11 motion should be denied.

12 The need for grand jury secrecy remains paramount unless the  
13 defendant can show "a particularized need" that outweighs the policy  
14 of grand jury secrecy. United States v. Walczak, 783 F.2d 852, 857  
15 (9th Cir. 1986); United States v. Murray, 751 F.2d 1528, 1533 (9th  
16 Cir. 1985). The Government does not anticipate calling as a witness  
17 in this case any witness that previously testified about it before the  
18 Grand Jury. Accordingly, there is no extraordinary basis to support  
19 Defendant's request for grand jury transcripts.

20 **11. PRECLUDE DOCUMENTS OF DEPORTATION AS EVIDENCE OF ALIENAGE**

21 Defendant argues that the warrant of deportation and the order  
22 of deportation are only admissible to prove the element of deportation  
23 and may not be used to prove alienage. Defendant's contentions are  
24 wrong and contrary to Ninth Circuit authority.

25 The documents from Defendant's A-File are relevant to prove  
26 Defendant's alienage. See Hernandez-Herrera, 273 F.3d 1213, 1217-18  
27 (9th Cir. 2001) ("deportation documents are admissible to prove  
28 alienage"); United States v. Contreras, 63 F.3d 852, 857 (9th Cir.  
1995) ("We have held that deportation documents are admissible to prove

1 alienage under the public records exception to the hearsay rule." ).  
2 Defendant misconstrues how the A-File documents will be used.  
3 Although these documents, standing alone, do not conclusively  
4 establish a defendant's alien status, United States v. Sotelo, 109  
5 F.3d 1446, 1449 (9th Cir. 1997), deportation documents are admissible  
6 to prove Defendant's alienage. United States v. Loyola-Dominquez, 125  
7 F.3d 1315, 1317 (9th Cir. 1997). Consequently, Defendant's request  
8 for a limiting instruction should be denied.

9 Likewise, Defendant's request for the word "alien" to be redacted  
10 from the warrant of deportation documents should be denied. Defendant  
11 contends this word should be redacted pursuant to Rule 403. As  
12 discussed above, the word alien in and of itself is not so prejudicial  
13 as to unduly influence the jury in its decision making. Indeed, one  
14 of the elements the Government has to prove at trial is that Defendant  
15 is an alien; a Section 1326 prosecution cannot go forward without  
16 references being made to Defendant's alienage. Removal of references  
17 to alienage on the warrants of deportation would prevent the  
18 Government from presenting a complete picture of the deportation  
19 proceedings.

19 **12. GRANT LEAVE TO FILE FURTHER MOTIONS**

20 The Government does not object to the granting of leave to file  
21 further motions as long as the order applies equally to both parties  
22 and any additional defense motions are based on newly discovered  
23 evidence or discovery provided by the Government subsequent to the  
24 instant motion.

25 //

26 //

27 //

28 //

III

CONCLUSION

For the foregoing reasons, the United States respectfully asks that the Court deny Defendant's motions where indicated.

DATED: April 7, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

s/ Peter J. Mazza  
PETER J. MAZZA  
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE REYMUNDO  
CONTRERAS-HERNANDEZ,

Defendant.

Case No. 07-CR-3190-JAH

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, PETER J. MAZZA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the Government's Motions in Limine on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Candis Mitchell, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2008.

s/ Peter J. Mazza  
PETER J. MAZZA